

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

1. The petitioner is a mentally disabled elderly woman
who resides at a nursing home in Vermont. The petitioner

has been a resident of that nursing home since April of 2001.
She first lived in the lower level "assisted living" portion of the home but in July of 2003 she moved to the higher level nursing home portion of the home. The petitioner acts through her daughter, R., whom she has granted her power of attorney.

2. In June of 2003, the petitioner owned property in Massachusetts which was held in trust. The trust property consisted of a house formerly occupied by the petitioner as her home. The home had been placed in a trust in 1990 for the benefit of her two daughters, R. and J. The home is currently assessed by the town at \$650,000. In the absence of any evidence to the contrary, it is found that the assessed value of the home is also its fair market value.

3. The petitioner's daughter, R., had the trust evaluated by an attorney in Vermont. Based on that conversation, the petitioner's daughter concluded that the property must be transferred out of the trust.

4. On August 1, 2003, the Department of Economic Services (then PATH) amended Medicaid Policy M213. This amendment prohibited an applicant from being considered a resident of Vermont for purposes of qualifying for Medicaid if that person owned a home in another state "which the

individual intends to return to, even if the likelihood of return is apparently nil." M213(6.)

5. On August 19, 2003, the petitioner's daughter, trustee of the trust, conveyed the property out of trust to the petitioner. The petitioner received a life estate and the right to sell the property in fee simple absolute or any lesser fee during her life. A contingent remainder interest (the right to receive the property on the petitioner's death if not sold or otherwise conveyed) was vested in the petitioner's children, R. and D.

6. On September 16, 2003, the petitioner through her attorney in fact, applied for Long-Term Care Medicaid. The house in Massachusetts was listed as real estate owned by the petitioner on that application.

7. The petitioner abandoned her claim that she intended to return to her Massachusetts property. The petitioner did not say when this "abandonment" occurred but absent any other explanation offered by the petitioner it is found that this was the result of her learning about the change in the Medicaid regulation set forth in paragraph four above.

8. On December 11, 2003, R. and her husband, through the petitioner's family, presented verification to the Department of money they expended for the petitioner's benefit

for payment of Assisted Living Care (Level III) and expenses for maintenance and improvement of the Massachusetts property. The documents submitted as verification include copies of 29 checks drawn on an account from W. Savings Bank, and dated from August 11, 2001 through October 31, 2003. The documents submitted as verification also include copies of VISA bills and handwritten notations indicating expenses from June through December 2001 for the Massachusetts property.¹ The bills amounted to some \$48,651. Daughter R. testified at hearing that she expected she would be reimbursed from the proceeds of the sale of the Massachusetts property for the expenses she and her husband have incurred on behalf of the petitioner. At the time the expenditures were made, the original trust indicates that Daughter R. and her sister had an expectation that they would become owners of the home upon their mother's death.

9. On December 22, 2003, the petitioner conveyed a remainder interest in the Massachusetts property to her daughters, R. and J. The petitioner offered no evidence as to

¹ These bills can be presented to the Department in order to reduce the amount of the disqualifying transfer if the transferee has paid bills for the transferor. In this case, the petitioner would have been allowed to reduce the value of the transfer to her daughter by the amount of assistance her daughter could prove she had given her. M440.2(e).

why she transferred this property to her daughters while her Medicaid application was pending.

10. On December 30, 2003, the petitioner entered into a lease for the property with her Daughter R. and her daughter's husband. Daughter R., acting as power of attorney on behalf of the petitioner, claims that the petitioner entered into the December 30, 2003 lease in consideration of the expenses Daughter R. and her husband made on the petitioner's behalf. The lease recited total rent payments of "six percent of the value of the property as that value is determined by the assessment from the taxing authority" to be paid by Daughter R. and her husband to the petitioner in monthly installments. Daughter R. was, in addition to making the payment under the lease, responsible for paying all the expenses associated with the property. The lease was signed by Daughter R. on behalf of the petitioner as power-of-attorney. The lease was backdated to August 1, 2003 and was to run through July 31, 2004. The language in the lease itself did not relieve Daughter R. from paying the rent to the petitioner in consideration of expenses which she may have incurred on her mother's behalf.

11. At the time the lease was made, the monthly payment would have been \$3,250 based on the current assessment of \$650,000. The Department disputes the validity of the lease.

12. Despite, Daughter R.'s claims, no evidence was offered that the petitioner ever agreed that she had a legal obligation to currently repay Daughter R. any of the money Daughter R. says was expended on her nursing care or on expenses for maintaining the house. It must be concluded, therefore, that the petitioner has not agreed to the fact of or the amount of the legal obligation claimed by Daughter R.

13. No evidence was offered showing that the petitioner ever agreed to waive her payments under the lease to offset any amounts she might owe to Daughter R. It must be concluded, therefore, that no waiver existed and that the terms of the agreement are set out in the lease document requiring payments to actually be made to the petitioner.

14. On January 13, 2004, the petitioner's attorney forwarded to the Department a copy of the lease between Daughter R. and the petitioner.

15. On April 13, 2004, the Department received from the office of the petitioner's attorney a copy of the December 22, 2003 deed conveying a remainder interest to the petitioner's two daughters.

16. On May 13, 2004, the Department forwarded a letter to Daughter R. to inform her that the petitioner's application for Long-Term Care Medicaid had been denied. The reason for the denial was that she owned non-exempt property which was valued in excess of the Medicaid resource limit and that she had transferred part of the value of that property to her daughters in December without receiving fair market value. The Department concluded that the transfer would disqualify the petitioner for eighty-one months.

17. Daughter R., through her attorney, appealed the Department's decision on May 13, 2003. The petitioner, in her brief, has agreed that the transfer would be disqualifying only if her property was not producing significant income. She did not raise any dispute with regard to the valuations and calculations the Department used in reaching the number of disqualifying months.

18. In April of 2004, Daughter R. sublet the house on the open market and was able to obtain only \$2,600 per month in rent. Daughter R testified that she intended to make up the difference between the \$2,600 she got from the sublet and the \$3,250 monthly rent due under the lease (six percent of the annual market value divided by twelve months) from her own pocket and pay it over to her mother once her mother's debt to

her was repaid. It appears that Daughter R. recovered far less than the \$48,000 she claims was owed to her under the lease, recovering at best something far less than \$10,000 after taxes and other expenses were deducted from the sublet rent.

19. Daughter R has, in fact, never made any payments to the petitioner pursuant to the lease agreement. It must be concluded that the year long lease of the house entered into by the petitioner never produced any income for the petitioner whatsoever, produced little, if any, compensation for Daughter R and, in fact, was a complete sham concocted by the petitioner's Daughter, as her attorney in fact, to make it appear that the property was producing a significant amount of income at the time the remainder interest in the property was transferred in December 2003.

20. Given these facts, and the absence of any evidence to the contrary, it is found that the petitioner's transfer to her daughters of all but a life estate in her house in December of 2003 was made for the purpose of becoming eligible for Medicaid.

21. The petitioner offered no evidence that the delay in making a final decision on her Medicaid eligibility was caused by any negligence on the part of the Department. Rather, the delay appears to have been the result of asset restructuring

changes made by the petitioner in the months following her application.

ORDER

The decision of the Department is affirmed.

REASONS

Under the federal regulations at 42 USC § 1396 *et seq.*, the Medicaid program "is designed to afford medial assistance to persons whose income and resources are insufficient to meet the financial demands of necessary care and services." The Vermont Supreme Court has bluntly described the Medicaid program as established "to provide medical assistance to the poor." Stevens v. D.S.W. 159 Vt. 408, 412-413 (1992). The Department has an obligation to scrutinize financial arrangements carefully to screen out schemes designed to shield claimant's assets and make sure that benefits are available only to the needy. See Johnson v. Silbernagel, No. 01-3774, Fed App Cir 3rd (Feb. 6, 2004). There is nothing in federal or state Medicaid policy which favors the preservation of estates for children or heirs.

To this end, persons applying for long term care in the Medicaid program are subject to penalties if they transfer non-exempt resources to family members or others for less than

fair market value around the time they have applied for Medicaid. M440 and M440.1. The petitioner does not dispute that she transferred a valuable interest in the real estate that she owns (namely, her right to sell or otherwise dispose of the property during her lifetime) for less than fair market value to her daughters several months after she applied for Medicaid. She contends, however, that the interest she transferred was an "excluded resource" and thus not subject to a penalty period. M440.3 (g).

There are many kinds of resources that are excluded from consideration in the long-term care program. M232. The petitioner relies on the provision excluding "real property producing significant income" in support of her contention that no penalty applies for the transfer. That exclusion reads as follows:

Real property producing significant income is exempt from consideration as a resource. Real property is considered to produce "significant income" if it generates at least 6 percent of its fair market value in net annual income after allowable expenses related to producing the income are deducted.

M232.17

At the time the petitioner applied for Medicaid in September of 2003, she owned the real estate at issue outright and could dispose of it as she wished. It was clearly not

producing income then and in fact was a liability in terms of income flow because of taxes, insurance and maintenance costs associated with the property. About three months later, the petitioner entered into an agreement with her daughter to lease her the home in return for \$39,000 per year, an amount equal to six percent of the fair market value. On its face, the document made it appear that the real estate owned by the petitioner was producing income. In reality, the petitioner did not get a penny in income from this deal. The petitioner's property may have eventually generated some income (far below six percent of the value) but the income did not come to her.

The plain import of the above regulation is to allow applicants and recipients of Medicaid to retain resources which will generate income which can be used to defray their medical needs. It is a recognition that it is foolish to kill the goose that lays the golden eggs. However, it does not allow the applicant to both retain the goose and give away the golden eggs. That is exactly what the petitioner is doing when she does not collect the income that is supposedly produced by the asset. It must be concluded as a legal matter that the petitioner's arrangements with her daughter did not

result in any income coming her way either at the time of her application or during the eleven months following it.²

The petitioner's argument that the income was actually paid months and years before the agreement was made when her daughter paid her bills must be rejected because the explicit written agreement between the petitioner and her daughter did not state that the income had been prepaid.³ The agreement clearly indicated that the income was yet to come in future monthly installments. The petitioner's daughter never intended to make those payments under the lease. The result is merely the appearance on paper that significant income was being produced when actually it was not. It cannot be found under these facts that the petitioner's real property was producing significant income as defined in the regulation.

As the petitioner's real property did not produce significant income, it cannot be excluded as a resource in determining her eligibility.⁴ Neither can it be considered an

²Even if this property had produced some income, it clearly was not set up to do so until at least December of 2003 when an agreement was reached to make the property income producing. No label of "income producing" could have been attached to the property before that month.

³ Surely the purpose of the income producing exclusion would be defeated if the petitioner was allowed to retain her asset but was using it to pay old bills and not to produce current income.

⁴ This recommendation should not be read as concluding that the petitioner could have transferred her property without penalty if her daughter had made payments under the lease. That question need not be reached in this decision.

"excluded resource" not subject to the transfer rules. Thus the Department was correct both that this \$650,000 resource exceeds the level for eligibility (\$2,000, M234) and that the petitioner's transfer of part of her interest in the resource was disqualifying because she offered no evidence that the transfer was done for purposes other than qualifying for Medicaid. M440.3(d).

The methodology used by the Department to calculate the disqualification period was not challenged by the petitioner. Since the transfer was made in part to Daughter D., under Departmental rules the value of the transfer can be reduced by the documented amount that Daughter D. has spent on her mother's medical care and for the maintenance of her home. M 440.2(e). Since Daughter D. provided those figures to the Department, they have presumably been taken into consideration to reduce the value of the transfer.

The petitioner's request to receive benefits due to the delay in making the decision in this matter is wholly without merit. The facts show that the petitioner changed her position and the structure of assets over a period of several months following her application which required constant reassessment by the Department. The final decision was made within a month of receipt of the final documents regarding the

lease and transfers. In addition, the facts now show that the petitioner was not eligible for Medicaid due to the sham income producing scheme and the transfer of her assets. The petitioner has made no case that she is entitled to long term care benefits for this or any reason.

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